STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee

v

MELVIN EARL HOWARD **No. 153651**
Defendant-Appellant.

L.C. No. 13-001442-FH
COA No. 324388

BRIEF BY PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN AS AMICUS CURIAE IN SUPPORT OF PEOPLE OF THE STATE OF MICHIGAN

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Statement of the Question

I.

When a defendant submits to retrial without moving to dismiss on grounds of double jeopardy, review of a jeopardy claim is, at best, for plain error. Defense counsel participated in an in-chambers discussion and a bench discussion regarding a problem witness, and when the mistrial was declared made no objection. Did plain error occur where circumstances demonstrate an implied consent to the mistrial, and in any event, the mistrial was justified by manifest necessity?

Amicus answers: "NO"

Statement of Facts

Amicus joins the statement of facts supplied by the People.

Argument

I.

When a defendant submits to retrial without moving to dismiss on grounds of double jeopardy, review of a jeopardy claim is, at best, for plain error. Defense counsel participated in an in-chambers discussion and a bench discussion regarding a problem witness, and when the mistrial was declared made no objection. No plain error occurred as circumstances demonstrate an implied consent to the mistrial, and in any event, the mistrial was justified by manifest necessity.

Introduction

This court has directed that the parties file supplemental briefs addressing:

- whether manifest necessity justified the grant of a mistrial at the defendant's first trial;
- whether defense counsel implicitly consented to the grant of a mistrial;
- whether defense counsel was ineffective for not moving to dismiss on double jeopardy grounds prior to retrial; and
- whether the statement in *People v Johnson*, 396 Mich 424, 432 (1976), that "[m]ere silence or failure to object to the jury's discharge is not such consent," is an accurate statement of law. Compare *Johnson* with *People v Lett*, 466 Mich 206, 223 n 15 (2002), and cases cited therein.

Amicus answers that:

- The failure to move for dismissal before retrial either waived or forfeited the claim of double jeopardy. If the claim was forfeited, plain error cannot be shown; if it was waived, counsel was not ineffective. In consideration of either standard:
- *People v. Johnson* is not a correct statement of the law concerning consent to a mistrial, as consent may be inferred from silence under certain circumstances;

- under the circumstances here, defense counsel implicitly consented to the mistrial, and so there is no error, let alone plain error, and this moots the question of whether manifest necessity for a mistrial existed;

- in any event, the trial judge did not abuse his discretion in finding that manifest necessity existed here for the declaration of the mistrial, even if counsel did not implicitly consent, so that no error, let alone plain error, occurred.

Discussion

A. The failure to move for dismissal before retrial either waived or forfeited the claim of double jeopardy; the synergy of ineffective assistance analysis and review for plain error

Even defendant concedes that defendant's submission to retrial without moving to dismiss on jeopardy grounds has consequences, saying that because there was no pretrial motion to dismiss the claim of error "must be reviewed under the plain error standard,"[1] citing *People v. Carines*.[2] And federal circuits reviewing a jeopardy claim under these circumstances now treat the issue as forfeited and thus subject to review for plain error,[3] as does the Court of Appeals.[4] This court has asked instead "whether defense counsel was ineffective for not moving to dismiss on double jeopardy grounds prior to retrial." Before the United States Supreme Court made clear the distinction between

[1] Defendant's application for leave, p.9.

[2] *People v. Carines*, 460 Mich. 750 (1999).

[3] See *United States v. Kelly*, 552 F.3d 824 (CA DC, 2009); *United States v. Lewis*, 492 F.3d 1219, 1220-1222 (CA 11, 2007) (en banc); *United States v. Hernandez-Guardado,* 228 F.3d 1017, 1028-1029 (CA 9, 2000); *United States v. Branham,* 97 F.3d 835, 842 (CA 6, 1996); *United States v. Penny,* 60 F.3d 1257, 1261 (CA 7, 1995); *United States v. Jarvis,* 7 F.3d 404, 409 (CA 5, 1993).

[4] *People v. Meshall*, 265 Mich. App 616, 628 (2005).

issue forfeiture and issue waiver in *United States v. Olano*[5] federal courts treated a jeopardy claim as waived if the defendant submitted to retrial without moving to dismiss on grounds of double jeopardy.[6] Issues that are waived are not subject to review for plain error, but for ineffective assistance.[7] Amicus is not entirely persuaded regarding the federal shift from waiver to forfeiture

[5] *United States v. Olano*, 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993).

[6] See e.g. *United States v. Brascaro*, 742 F.2d 1335, 1365 (CA 11, 1984), abrogated by *United States v. Lewis*, supra.

[7] See e.g. *People v. Kowalski*, 489 Mich. 488, 510, fn 38 (2011).

in these circumstances,[8] but in the end it is of no moment here. Indeed, as amicus will attempt to explain, it is virtually never of any moment.

Because the standards for plain error and ineffective assistance are virtually identical, whichever is applied here the defendant cannot prevail. These terms are, amicus submits, but different ways of labeling essentially the same inquiry, made under different circumstances. Though it may seem a manner of semantics, it is important to understand that with regard to issue forfeiture the doctrines of ineffective assistance analysis and plain-error review coalesce; otherwise, dual inquiries may needlessly be undertaken routinely. First, it may be asked whether the absence of

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[8] As explained in detail in *United States v. Lewis*, supra, abrogating *United States v. Brascaro*, supra, the shift in analysis federally was occasioned by the Supreme Court's decision in *Olano*. The court in *Lewis* said that because of *Olano* the circuit was now holding "that a waiver is the intentional relinquishment of a known right, whereas the simple failure to assert a right, without any affirmative steps to voluntarily waive the claim, is a forfeiture to be reviewed under the plain error standard . . . . Lewis took no affirmative steps to waive his right against double jeopardy; he simply failed to assert his right. Accordingly, Lewis forfeited his right to a double jeopardy defense, and his claim is entitled to plain error review." *United States v. Lewis*, 492 F.3d at 1222. This analysis simply assumes that *no* rights may be waived by a failure to assert them, and this is demonstrably untrue. The right to testify need not be affirmatively waived, see e.g. *United States v. Van De Walker*, 141 F.3d 1451, 1452 (CA 11, 1998) ("a trial court has no *sua sponte* duty to explain to a criminal defendant that he has a right to testify or to conduct an on-the-record inquiry into whether a defendant that is not testifying has waived the right knowingly, voluntarily, and intelligently"), and proper venue, which federally is constitutionally protected, is waived by a failure to object. See e.g. *United States v. Engle*, 676 F.3d 405, 413 (CA 4, 2012) ("Despite its constitutional dimension, proper venue may be waived by the defendant . . . and a failure to challenge a facially defective venue allegation constitutes a waiver"). It is arguable that jeopardy is such a right. Drawn from the historical pleas in bar of autrefois acquit, autrefois convict, and pardon, see *United States v. Scott*, 437 U.S. 82, 87, 98 S. Ct. 2187, 2192, 57 L. Ed. 2d 65 (1978), and based on "the deeply ingrained principle that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty," *Evans v. Michigan*, 133 S. Ct. 1069, 1084, 185 L. Ed. 2d 124 (2013), objection *after* retrial has a substantial "horse is already out of the barn" quality to it. But whether the inquiry be plain error or ineffective assistance, defendant cannot prevail here.

objection resulted in plain error, and then, if analysis shows not, the inquiry may proceed to whether the scenario involved constitutes ineffective assistance.[9] But on completion of the first inquiry the matter should be considered closed; either plain error has occurred resulting in reversal, or it has not. The doctrines of plain error and ineffective assistance are complementary, rather than ineffective assistance being supplementary to plain error. Plain error examines the forfeiture of an issue by way of failure to object to evidence or argument, or to object appropriately, or to object to or request an instruction; in short, of-record claims, whereas ineffective assistance analysis looks to such matters as the failure to present certain evidence, or to engage in certain investigation, or to prepare for trial properly; in short, not-of-record claims.[10] A synergy thus results.

The "elements" of the doctrines reveal this synergy. The elements of a plain-error claim, to all of which the party forfeiting the claim bears the burden of persuasion, are:

- that error occurred, to which no proper objection was made;
- that this error was plain or obvious; that is, it was so egregious and obvious as to make the trial judge and prosecutor derelict in permitting it, despite the defendant's failure to object—meaning, quite clearly, that counsel was derelict in failing to object;[11]

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[9] Amicus sees many cases where counsel first makes an argument of plain error, and then moves to ineffective assistance of counsel as a second rationale to be considered if the appellate court finds the argument of plain error unavailing. Or often a number of forfeited issues are raised as plain error, with a catch-all final issue alleging that even if plain error has not been shown, counsel was ineffective for not objecting properly.

[10] Also, issue waiver can raise a claim of ineffective assistance. If defense counsel, for example, presented a reasonable doubt instruction allowing conviction on a preponderance of the evidence, that counsel procured the error constitutes a waiver, rather than a forfeiture, of any claim—but that act would constitute ineffective assistance of counsel.

[11] See e.g. *United States v. Brown,* 352 F.3d 654, 665 n. 10 (CA 2, 2003); *United States v. Gore,* 154 F.3d 34, 42-43 (CA 2, 1998); *United States v Whab*, 355 F.3d 155, 158 (CA 2, 2004)

- that the error affected "substantial rights" of the defendant, which where error is preserved means that the prosecution cannot demonstrate that the error did have "substantial influence" on the factfinder,[12] so that with unpreserved error the burden is on the defendant to show that it did;[13]

- that the error affected substantial rights to the degree that it seriously affects the fairness, integrity, or public reputation of judicial proceedings.[14] This prejudice standard is met when it is shown that the error is "sufficient to undermine confidence in the reliability of the outcome" of the trial.[15]

Compare with the elements of the ineffective assistance inquiry, where the defendant must show that:

- Counsel erred;

- that the error(s) were so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment;

- that the error(s) prejudiced the defendant; and

- to the degree that the result of the trial is not reliable: "[t]o succeed on a Sixth Amendment claim of ineffective assistance of counsel, defendant must show that there is a reasonable probability,' which is

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[12] See *Kotteakos v United States*, 328 US 750, 90 L Ed 1557, 66 S Ct 1239 (1946).

[13] In Michigan, however, given MCL 769.26, which does not differentiate between preserved and forfeited error, the defendant maintains the burden of showing prejudice more likely than not occurred from the error even where the error was preserved by proper objection. *People v Lukity*, 460 Mich 484 (1999).

[14] See e.g. *Johnson v. United States,* 520 U.S. 461, 466-467, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997).

[15] "Put another way, the "defendant must . . . satisfy the judgment of the reviewing court, informed by the entire record, that the probability of a different result is sufficient to undermine confidence in the outcome of the proceeding." *United States. v. Turbides-Leonardo,* 468 F.3d 34, 39 -40 (CA 1, 2006). See also *United States. v. Dominguez Benitez*, 542 US 74, 124 S Ct 2333, 159 L.Ed.2d 157 (2004). The cases use the same "undermine confidence in the outcome" definition as is used in the ineffective-assistance inquiry into prejudice.

> a probability sufficient to undermine confidence in the outcome, that, but for counsel's unprofessional errors, result of the proceeding would have been different."[16]

A number of cases have held that the prejudice standards for plain error and ineffective assistance are virtually identical,[17] and it has been suggested that the only difference between the two inquiries is that it may be *more* difficult to show the "error prong" under ineffective assistance than under plain error.[18] And it has been said that "It would be nonsensical if a [defendant] . . . could subject his challenge of an unobjected-to error to a lesser burden by articulating it as a claim of ineffective assistance."[19]

Whether viewed, then, as an assertion of plain error or ineffective assistance, the analysis, certainly in the present case, is virtually the same, and in neither can the defendant prevail.

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[16] *Strickland v. Washington*, 466 US 668, 104 S Ct 2052, 80 L Ed 2d 674 (1984).

[17] See e.g. *State v. Woods*, 47 N.E.3d 894, 897–898 (2016); *State v. McNeil*, 365 P.3d 699, 704–705 (2016) ("We have held that the prejudice test is the same whether under the claim of ineffective assistance or plain error"); *Reed v. State,* 793 N.W.2d 725, 735–736 (Minn.2010) (concluding that, when no prejudice existed relating to plain-error review of accomplice-corroboration-instruction issue, no prejudice existed for purpose of ineffective-assistance claim based on same issue); *Close v. United States*, 679 F.3d 714, 720 (CA 8, 2012); *Becht v. United States,* 403 F.3d 541, 549 (CA 8, 2005) ("[t]he standard for prejudice under *Strickland* is virtually identical to the showing required to establish that a defendant's substantial rights were affected under plain error analysis").

[18] "[W]e have suggested that the standard for plain error review and ineffective-assistance-of-counsel are comparable, and in some respects, plain error review may be less demanding. *See United States v. Remsza,* 77 F.3d 1039, 1044 (7th Cir.1996) (noting that prejudice prongs of both tests are nearly identical). See also *Gordon v. United States,* 518 F.3d 1291, 1300 (11th Cir.2008) (noting that 'the 'deficient performance' standard of an ineffective assistance claim will not always be satisfied by the failure to object to an obvious error'); *United States v. Williams,* 358 F.3d 956, 967 (D.C.Cir.2004) (noting analogy between prejudice standard in claims of plain error and claims of ineffective assistance)." *Swanson v. United States*, 692 F.3d 708, 717 (CA 7, 2012).

[19] *Gordon v. United States*, 518 F.3d at1298.

Defendant, after conceding that the claim of forfeited and that consequently review is for plain error, then argues the matter as though it were preserved; that is, that if error occurred defendant is entitled to relief. He forgets that error alone will not do. Submitting to retrial without moving to dismiss on jeopardy grounds must have been not simply error. As the federal cases put it, when review is for plain error the reviewing court is "to correct only particularly egregious errors,"[20] errors that are "so egregious and obvious as to make the trial judge and prosecutor derelict in permitting [them], despite the defendant's failure to object."[21] Here, then, defendant must show not only that error occurred because defendant did not impliedly consent to the mistrial, and because the mistrial was not justified by manifest necessity, but that both of these errors were so egregious that the trial judge and prosecutor were derelict in failing to prevent them. This defendant does not try to do in his pleadings, nor can he.

B. *People v. Johnson* is not a correct statement of the law concerning consent to a mistrial, as consent may be inferred from silence under certain circumstances

In *People v. Johnson*[22] defendant's trial ended in a mistrial when his attorney engaged in misconduct, asking a police witness whether defendant had asked the officer if he could submit to a "lie-detector test." The prosecutor objected, and moved for a mistrial. The codefendant's counsel joined in the motion; Johnson's counsel neither expressly consented nor objected, saying he "felt kind of small" and did not realize his question was improper. The next day the prosecutor withdrew the motion for mistrial, but the codefendant's counsel pressed for it. It appears that Johnson's

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[20] *United States v. Corso*, 549 F.3d 921, 931 (CA 3, 2008).

[21] *United States v. Brown*, 352 F.3d 654, 664–665 (CA 2, 2003).

[22] *People v. Johnson*, 396 Mich. 424 (1976), abrogated on other grounds by *People v. New*, 427 Mich. 482 (1986).

counsel made no statement. The mistrial was granted. New counsel for defendant moved for dismissal on jeopardy grounds. The trial judge denied the motion on the ground that the error causing the mistrial had been made by Johnson's own counsel, and after trial began both defendants pled guilty.

This Court held that while termination of a trial with the defendant's consent allowed retrial under principles of double jeopardy, "[m]ere silence or failure to object to the jury's discharge is not such consent."[23] The Court found a bright-line rule advisable, and because, said the Court, "It is not difficult to require a trial court to inquire whether defendant consents. . . . in the absence of an affirmative showing on the record, this Court will not presume to find such consent." Because there was no affirmative showing of consent, the court set aside the plea-based conviction, finding no manifest necessity for the mistrial.[24] Two justices dissented.[25] Justice Coleman wrote that as to the question of consent, the circumstances surrounding the mistrial declaration must be examined to determine whether the defendant retained "primary control." Where it was defendant's attorney who asked the objectionable question, the codefendant's attorney insisted on a mistrial, and defense counsel "essentially apologized, saying, '(a)ll I can say is I didn't realize it was improper' and, 'I feel kind of small,'" the dissent believed that, in the absence of a specific objection by defense counsel, it could be concluded that the defendant "joined with the codefendant in seeking a mistrial." As to the majority's statement that "defendant must . . . do something positively in order to indicate he or

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[23] *People v. Johnson*, 396 Mich. at 432.

[24] *People v. Johnson*, 396 Mich. at 433. It appears the Court required personal consent by the defendant him or herself to the mistrial, as it concluded that "defendant did not personally consent to the end of the first trial" in finding further proceedings barred by jeopardy.

[25] The opinion was 3-2, with two justices not participating.

she is exercising that primary control," the dissent found no support in the majority's cited case,[26] and concluded that a "reviewing court may examine the totality of the circumstance in considering whether such control existed. The totality of the instant facts reveal control. Defendant need not raise a red flag."[27]

In *People v. Lett*[28] this Court found manifest necessity for the declaration of a mistrial on the basis of the failure of the jury to agree. The People had also argued that the defendant had implicitly consented to the mistrial, so that the issue of manifest necessity need not be determined. The Court did not reach this question given its decision on manifest necessity, saying it was "saving it for another day," and noting cases that appear contrary to *Johnson*.[29] That other day may have arrived here. The cases collected in footnote 15 of the *Lett* opinion stand for the proposition that explicit consent expressed either by the defendant or his counsel is not required to find consent to a mistrial;

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[26] *United States v. Dinitz*, 424 U.S. 600, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976).

[27] *People v. Johnson*, 396 Mich. at 451 (Coleman, J., dissenting).

[28] *People v. Lett*, 466 Mich 206 (2002).

[29] *People v. Lett*, 466 Mich. at 223 fn 15: "it appears from the record that defendant did not object to the trial court's decision to discharge the jury. The prosecution contends that under these circumstances defendant 'implicitly consented' to the declaration of mistrial, thus rendering it unnecessary to determine whether the declaration was supported by manifest necessity. See *Hicks, supra,* 447 Mich. at 858, n. 3, 528 N.W.2d 136 (Boyle, J., dissenting) ('[t]he Supreme Court appears to use 'consent' . . . to refer to mistrials not requested by the defendant, *but only acquiesced to*") (emphasis supplied); see also *United States v. Aguilar–Aranceta,* 957 F.2d 18, 22 (C.A.1, 1992); *United States v. Beckerman,* 516 F.2d 905, 909 (C.A.2, 1975); *United States v. Phillips,* 431 F.2d 949, 950 (C.A.3, 1970); *United States v. Ham,* 58 F.3d 78, 83–84 (C.A.4, 1995); *United States v. Palmer,* 122 F.3d 215, 218 (C.A.5, 1997); *United States v. Gantley,* 172 F.3d 422, 428–429 (C.A.6, 1999); *Camden v. Crawford County Circuit Court,* 892 F.2d 610, 614–618 (C.A.7, 1989); *United States v. Gaytan,* 115 F.3d 737, 742 (C.A.9, 1997); *Earnest v. Dorsey,* 87 F.3d 1123, 1129 (C.A.10, 1996); *United States v. Puleo,* 817 F.2d 702, 705 (C.A.11, 1987). In light of our determination that the mistrial declaration was manifestly necessary, we save for another day the issue of implied consent."

rather, that consent may be implicit in the circumstances. And this Court has on several occasions found consent when that consent was not explicitly given, certainly not by the defendant:

- On order of the Court . . . we VACATE the judgment of the Court of Appeals and REMAND this matter to the Oakland Circuit Court for a new trial. The record in this case reveals circumstances from which consent to the circuit court's declaration of a mistrial *can be inferred*. Therefore, retrial is not barred by the constitutional protection against double jeopardy.[30]

- On order of the Court . . . we REVERSE the judgment of the Court of Appeals because the trial court did not clearly err in finding that the defendant consented to the mistrial declared by the court. Where a defendant consents to a mistrial, double jeopardy considerations do not apply.[31]

The cases cited in footnote 15 of *Lett*, as well as other cases, make clear that the accepted understanding is that "When a criminal defendant consents to a mistrial before the jury reaches a verdict, double jeopardy will not bar a reprosecution. . . .This consent can either be express or

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[30] *People v. McGee*, 469 Mich. 956 (2003) (emphasis supplied).

[31] *People v. Camp*, 486 Mich. 914 (2010). The Court of Appeals opinion reveals that defense counsel sought a remedy for the mention of another case, and at first, the alternative of a mistrial if the result of that case—an acquittal—was not revealed to the jury. Ultimately, when the court asked finally for the relief defendant wanted, his counsel said "the only remedy is for the jury to know what happened in the Livingston County case. That's the only way to clear that up. And I'm asking the Court to-to allow the admission of that verdict as to the complainants in that case, or in the alternative a dismissal of the charge-of all the charges in both cases." The trial court granted a mistrial, and the Court of Appeals found that the defendant had not consented: "the prosecutor implicitly requested a mistrial when she stated that placing the acquittal before the jury was 'so prejudicial as opposed to probative' and that [the victim] was entitled to have an unprejudiced jury hear the case, and . . . the trial court granted the mistrial because informing the jury of the acquittal would 'devastate[ ]' the prosecution's case. Thus, it was not defendant's request for a mistrial that was granted; rather, it was the prosecutor's implied request for a mistrial that was granted by the trial court. Defendant did not consent to the prosecutor's request. Defendant, because the trial court had granted his request to inform the jury of his acquittal in the Livingston County trial, no longer had a need to object to having his trial completed before the jury that heard Kurth's testimony. Consequently, we conclude that defendant did not consent to the mistrial." *People v. Camp*, No. 285101, 2009 WL 2974772, 2-4 (2010).

implied. *If a defendant does not timely and explicitly object to a trial court's sua sponte declaration of mistrial, that defendant will be held to have impliedly consented to the mistrial and may be retried in a later proceeding*."[32] As another case puts it, "The determination of whether a defendant objected to a mistrial is made on a case-by-case basis, and the critical factor is whether a defendant's objection gave the court sufficient notice and opportunity to resolve the defendant's concern."[33] There must exist, of course, an opportunity for defense counsel to object, and then the "requisite consent may also be implied from a defendant's acts or failures to act, such as where the *defendant sits silently by and does not object to the declaration of a mistrial even though he has a fair opportunity to do so.*"[34]

C. Under the circumstances here, defense counsel implicitly consented to the mistrial, and so there is no error, let alone plain error, and this moots the question of whether manifest necessity for a mistrial existed

From the record, defense counsel should have anticipated that a mistrial was under consideration, and, when the trial judge granted it, could easily have stood up and objected if he wished the trial to continue. Nothing whatsoever prevented him from so doing. Because of the problem with likely perjured testimony from the prosecution witness that the prosecutor reported to

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[32] *United States v. Palmer*, 122 F.3d 215, 218 (CA 5, 1997) (emphasis supplied).

[33] *United States v. El-Mezain*, 664 F.3d 467, 559 (CA 5, 2011).

[34] *United States v. Toribio-Lugo*, 376 F.3d 33, 40 (CA 1, 2004) (emphasis supplied). See also *United States v. Gantley*, 172 F.3d 422, 428–429 (CA 6, 1999); *State v. Carey*, 77 A.3d 471, 476 (Maine, 2013) ("A defendant's failure to object [to a mistrial] operates as implied consent to the declaration of mistrial . . . when the defendant had an opportunity to object and did not"); *Camden v. Circuit Court of Second Judicial Circuit, Crawford Cty., Ill.*, 892 F.2d 610, 618 (CA 7, 1989) (" Defense counsel should have anticipated the possibility of a mistrial and been prepared to object or suggest more acceptable alternatives when the trial judge announced his ruling"); *United States v. Ham*, 58 F.3d 78, 83–84 (CA 4, 1995); *United States v. DiPietro,* 936 F.2d 6, 11–12 (CA 1,1991); *United States v. Lara-Ramirez*, 519 F.3d 76, 83 (CA 1, 2008).

the trial judge, an in-chambers conference had been held, and then also a bench conference. The matter was then discussed on the record with the jury absent. The prosecutor's comments imply that some remedy was expected from the judge: "Now, I will say this: Whatever the Court does, whatever action the Court takes, obviously, we will respect, and I understand that the Court has concerns as do I. I guess my only question is whether or not this impacts on the complaining witness's testimony. That would be the only thing that I would ask the Court to consider before you make the ruling. Now, I understand that the jury has been given information, but the only thing that I would ask the Court to consider is ... whether this problematic testimony necessarily impacts the testimony from [the victim]."[35] The judge then said:

> My concern, frankly, is having this issue, which is an important issue, go to the jury with the status of this testimony. . . and this witness. Frankly, I—let me back up. I thank you, [prosecutor] for bringing it to the Court's attention. You are an ethical attorney, and you always have been in this court, and I respect that. Nothing that happened here ""is—not only is not the fault of the Prosecutor or the police, but—they have both been forthcoming with the Court. My concern is that the status of this testimony taints this jury to the degree that I don't think it's fair either to [defendant] or, frankly, to [the victim's] complaint to allow this matter to go to the jury on this basis.
>
> I'm going to declare a mistrial in this matter.[36]

Defense counsel "sat silently by and did not object," and though not invited to express his opinion, certainly had the opportunity to do so. He had simply to stand to his feet and say that he objected and wished to continue the trial, suggesting an alternative remedy. He did not. Consent to the mistrial is thus implied.

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[35] *People v. Howard*, No. 324388, 2016 WL 902142, 2 (2016).

[36] *People v. Howard*, at 2.

The protection afforded by the jeopardy clause is not a game of "gotcha," or a parlor trick to make a trial designed to resolve the charges brought against the defendant by the action of a fair and impartial jury vanish. Counsel knew there was a problem, knew the court was considering some remedy, and sat on his hands when the mistrial was declared. Retrial is appropriate in these circumstances, and the jeopardy clause is not offended.

D. In any event, the trial judge did not abuse his discretion in finding that manifest necessity existed here for the declaration of the mistrial, even if counsel did not implicitly consent, so that no error, let alone plain error, occurred

For there to have been error at all, the trial judge's declaration of a mistrial, implicitly finding manifest necessity, must be found to have been an abuse of discretion, and thus outside the range of principled outcomes.[37] This means that the trial judge's decision stands unless "no reasonable person could have ruled as he did."[38] And here, the issue being unpreserved, the error of the judge must be egregious.

The trial court's broad discretion in granting a mistrial is well established.[39] A mistrial may be granted when, "taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated."[40] Further,

> Where, for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision, the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial

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[37] *People v. Schaw*, 288 Mich. App 231 (2010).

[38] *United States v. Munyenyezi*, 781 F.3d 532, 541 (2015).

[39] *Illinois* v *Somerville*, 410 U.S. 458, 93 S.Ct. 1066, 35 L.Ed.2d 425 (1973); *Wade* v *Hunter*, 336 U.S. 684, 690, 69 S.Ct. 834, 93 L.Ed. 974 (1949); *Arizona v Washington,* 434 U.S. 497, 509, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978).

[40] *United States v Perez,* 22 U.S. 579, 580, 6 L. Ed. 165, 9 Wheat. 579 (1824).

> may be declared without the defendant's consent and even over his objection, and he may be retried consistently with the Fifth Amendment.[41]

A trial court's failure to explicitly find manifest necessity or examine alternatives to a mistrial does not render the mistrial ruling constitutionally defective so long as the record provides adequate justification for the trial court's ruling.[42]

The circumstances under which a mistrial may be granted have not and cannot be clearly defined given the myriad of unforseen circumstances that arise during trial. The Supreme Court has eschewed any mechanical test, recognizing the primacy of the trial court in the matter. In *Wade v Hunter*[43] the Court said that "The value of the *Perez* principles thus lies in their capacity for informed application under widely different circumstances, without injury to defendants or to the public interest," and in *Illinois v Somerville* the Court reiterated the impossibility of applying any mechanical formula to determine whether the trial court properly granted a mistrial "in the varying and often unique situations arising during the course of a criminal trial."[44] The Court further said that "[t]he interests of the public in seeing that a criminal prosecution proceed to verdict, either of acquittal or conviction, need not be forsaken by the formulation or application of rigid rules that necessarily preclude the vindication of that interest."[45]

The statements by Judge O'Brien concurring in affirmance here are apt:

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[41] *Gori v United States,* 367 U.S. 364, 368, 81 S.Ct. 1523, 1526, 6 L.Ed.2d 901 (1961).

[42] *Arizona v Washington,* 98 S.Ct. at 835-836. And see *People v Rutherford*, 208 Mich App 198, 202 (1994).

[43] *Wade v Hunter*, 69 S Ct. At 838.

[44] *Illinois v Somerville*, 93 S.Ct. At 1069.

[45] *Illinois v Somerville*, 93 S Ct. At 1070.

> Whether a mistrial was manifestly necessary is anything but a bright-line inquiry. . . . Rather, it is highly dependent upon the facts and circumstances that are present before the trial court in each case. It is clear that, as a reviewing court, we are not determining whether we would have concluded that a mistrial was strictly necessary. . . . Instead, we are determining only "whether the trial court *abused its discretion* in" concluding whether there was "a 'high degree' of necessity" for declaring a mistrial." . . . Under the unique facts and circumstances of this case, I would conclude that it did not.
>
> Here, the prosecution fulfilled its affirmative duty to correct false testimony. . . . It is clear from the record that the false testimony was the product of innocent conduct on behalf of the prosecution and judge. . . . Then, after a thorough effort by the trial court to avoid declaring a mistrial, including an in-chambers discussion with the attorneys, a warning to the witness that she would be held in contempt if her uncooperative behavior continued, a bench conference, and an on-the-record discussion, the trial court concluded that a mistrial was manifestly necessary because witness's uncooperative behavior, which included undisputedly false testimony, "taint[ed] the jury" with respect to the victim *and the defendant.* While I certainly can respect defendant's argument that options other than a mistrial were available to the trial court, that is not the appropriate inquiry, and I simply cannot conclude that the trial court's decision, under the unique facts and circumstances of this case, constituted an abuse of discretion.[46]

It cannot be said that the decision of the trial judge was outside the range of principled outcomes—one that no reasonable jurist could have reached. There was no abuse of discretion, and thus, even if consent is not found, certainly no *plain* error.

E. Conclusion

Amicus strongly urges that this Court find that there was no plain error—nor ineffective assistance, if viewed that way—committed here, because the defense impliedly consented to the mistrial, and abrogate *People v Johnson*. If the Court does not so conclude, it should find that there

[46] *People v. Howard*, at 7.

was no plain error in the Court's implied conclusion that manifest necessity required a mistrial, as that decision cannot be said to be an abuse of discretion, one no reasonable jurist would reach.

Relief

Wherefore, amicus requests that this Court affirm the decision of the Court of Appeals.

Respectfully submitted,

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